LAW KAM LOY & ANOR

v.

BOLTEX SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAHMAH HUSSAIN JCA
VINCENT NG J
[CIVIL APPEAL NO: A-02-406-2000]
27 JUNE 2005

CONTRACT: *Construction - Transfer of shares, agreement for - Claim by plaintiffs for transfer of shares owned and held by first defendant in another company - Agreement executed by plaintiffs and second to sixth defendants - First defendant not party to agreement - Whether there was a concluded and enforceable agreement - Whether doctrine of privity of contract applicable*

COMPANY LAW: *Separate legal entity - Veil of incorporation - Special circumstances - Actual or equitable fraud - Whether corporate veil ought to be pierced*

This case concerned a claim by the appellants/plaintiffs against the respondents/defendants for the transfer of shares owned and held by the first defendant, Boltex Sdn Bhd ('Boltex'), in another company called Dragonbite Holdings Sdn Bhd ('Dragonbite'). The claim arose out of a document ('exh. P1') that was executed by the plaintiffs and the second to the sixth defendants. Exhibit P1, to which Boltex was not a party, recited that among other things that "have been agreed in principle", all the shares of Dragonbite belonging to Boltex should be transferred to the first plaintiff and his nominees. Boltex raised a counterclaim against the appellants. The learned trial judge held that there was no concluded agreement between the parties and dismissed the claim and the counterclaim. Hence, the present appeal and cross-appeal.

Held (dismissing the appeal and cross-appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] Having regard to the ambiguous and uncertain language in which exh. P1 had been cast, this court concurred with the learned trial judge's finding that there was no concluded and enforceable agreement between the parties who had executed exh. P1. Even if this were the wrong view, there was another ground on which the decision of the learned trial judge may be

upheld. If the shares belonged to Boltex, it was hardly comprehensible how persons who had no ownership rights in those shares could possibly enter into an agreement dealing with their transfer, and since Boltex was not a party to exh. P1, any promise that may have been made by the second to the sixth defendants was not enforceable against it by reason of the doctrine of privity of contract. (p 359 a-d)

[2] In the present appeal, it was not the plaintiffs' case that special circumstances existed here indicating that Boltex was a mere façade concealing the true facts, nor was a case of actual or equitable fraud raised on the pleading. It was, therefore, of no avail to the plaintiffs to say without more that this was a case for piercing the corporate veil since they simply had not laid any evidential foundation to support that plea. On the basis of current authority, there was no justification whatsoever in law to pierce the corporate veil of Boltex for the purpose of treating its property as the property of the second to sixth defendants. (p 363 h)

[3] So far as the counterclaim was concerned, the learned trial judge dismissed it on the ground that there was no basis for it. This court respectfully concurs with his reasons for the dismissal. In any event, if the plaintiffs had done any harm to Dragonbite or its property, it did not lie in the mouth of Boltex to complain about it unless it could bring itself within one of the exceptions to the rule in *Foss v. Harbottle*. However, since the counterclaim was never argued on that basis, that was an end of that. (p 364 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Kes ini melibatkan tuntutan oleh perayu/plaintif terhadap responden/defendan untuk pemindahan saham syarikat Dragonbite Holdings Sdn Bhd ('Dragonbite') yang dimiliki dan dipegang oleh defendan pertama, Boltex Sdn Bhd ('Boltex'). Tuntutan berbangkit dari satu dokumen ('eks. P1') yang dimeterai oleh plaintif dengan defendan-defendan kedua hingga keenam. Eks. P1, yang mana Boltex bukanlah satu pihak kepadanya, antara lain menyatakan bahawa adalah "dipersetujui pada prinsipnya" bahawa kesemua saham Dragonbite milik Boltex akan dipindahkan kepada plaintif pertama dan nomini-nomininya. Boltex mengemukakan tuntutan balas terhadap perayu-perayu. Yang arif hakim memutuskan bahawa tiada perjanjian yang sah telah dimasuki oleh pihak-pihak dan dengan itu menolak kedua-dua tuntutan dan tuntutan balas. Akibatnya adalah rayuan dan rayuan balas di sini.

Diputuskan (menolak rayuan dan rayuan balas)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Mengambilkira bahasa eks. P1 yang kabur dan kurang jelas, mahkamah ini bersetuju dengan dapatan yang arif hakim bicara bahawa tidak wujud sebarang kontrak termeterai yang boleh dilaksanakan di antara pihak-pihak yang menandatangani eks. P1. Jikapun ini merupakan satu pendapat yang silap, terdapat satu alasan lain yang membolehkan keputusan yang arif hakim bicara itu dipertahankan. Jika saham-saham dipunyai oleh Boltex, adalah sukar difahami bagaimana orang-orang yang tidak mempunyai hak pemilikan terhadap saham-saham tersebut boleh memeterai perjanjian bagi melaksanakan pemindahannya, dan lagi, oleh kerana Boltex bukan merupakan pihak kepada eks. P1, segala janji yang mungkin dibuat oleh defendan-defendan kedua hingga keenam adalah tidak boleh dilaksanakan terhadap Boltex disebabkan doktrin priviti kontrak.

[2] Dalam rayuan semasa, bukanlah menjadi kes plaintif bahawa wujud halkeadaan istimewa yang menunjukkan bahawa Boltex hanyalah dinding yang menyembunyikan fakta sebenar. Begitu juga, tiada kes fraud sebenar atau fraud ekuiti telah dibangkitkan di dalam pliding. Oleh itu, adalah tidak wajar untuk plaintif mengatakan, atas fakta yang ada, bahawa ini adalah kes untuk merobek tabir korporat kerana pengataan sedemikian jelas tidak disokong oleh apa-apa keterangan. Berdasarkan kepada autoriti-autoriti semasa, tiada kewajaran langsung di sisi undang-undang untuk merobek tabir korporat Boltex dan menganggap harta-hartanya sebagai harta defendan-defendan kedua hingga keenam.

[3] Berkaitan rayuan balas, yang arif hakim menolaknya atas alasan bahawa ia adalah tidak berasas. Dengan hormat mahkamah ini bersetuju dengan alasan-alasan beliau dalam menolak rayuan balas tersebut. Apapun, sekiranya plaintif telah melakukan sebarang mudarat kepada Dragonbite, ataupun kepada harta-hartanya, ini tidak bererti bahawa Boltex berhak untuk membantah, kecualilah jika ia boleh membawa dirinya ke dalam pengecualian kaedah *Foss lwn. Harbottle*. Bagaimanapun, oleh kerana rayuan balas tidak diperhujahkan atas dasar itu, maka ia harus berakhir di situ sahaja.*]*

Case(s) referred to:
Adams v. Cape Industries Plc [1990] Ch 433 ***(foll)***
DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852 ***(not foll)***
Foss v. Harbottle [1843] 67 ER 190 ***(refd)***
Hotel Jayapuri Bhd v. National Union of Hotel Bar and Restaurant Workers [1980] 1 MLJ 109 ***(refd)***
Jones v. Lipman [1962] 1 All ER 442 ***(refd)***
Kepong Prospecting Ltd & Ors v. Schmidt [1968] 1 MLJ 170 ***(refd)***
Macaura v. Northern Assurance Co Ltd & Ors [1925] AC 619 ***(refd)***
Salomon v. A Salomon & Co Ltd [1897] AC 22 ***(foll)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd [1997] 1 CLJ 529 FC
Woolfson v. Strathclyde Regional Council [1978] SLT 159 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 42

Other source(s) referred to:
Gower's Principles of Modern Company Law, 7th edn, p 184

For the appellants - Lee Seng Yan (Pramjit Singh with him); M/s Mohd Nor & SY Lee
For the 1st respondent - AI Raj; M/s Raj Selva & Co
For the 2nd-6th respondents - SN Leow; M/s SN Leow & Co

[Appeal from High Court, Ipoh; Civil Suit No: 22-197-1994]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

This is a tolerably plain case. It concerns a claim by the plaintiffs (appellants before us) against the defendants (respondents here) for the transfer of the shares owned and held by the first defendant, Boltex, in another company called Dragonbite Holdings Sdn Bhd. The claim arises out of a document (exh. P1) which was executed by the plaintiffs and the second to the sixth defendants. The learned trial judge has set out the document *in extenso* in his judgment and I am therefore spared from referring to it in any detail here. For present purposes it suffices to say that P1, to which Boltex was not a party, recites that among other things that "have been agreed in principle", all the shares of Dragonbite belonging to Boltex shall be transferred to the first plaintiff and his nominees. I must add that Boltex, for some reason that is not entirely clear raised a counterclaim against the appellants.

As a result of the way in which the case was argued before him, the learned judge held that there was no concluded agreement between the parties. He then dismissed the claim and the counterclaim. Having regard to the ambiguous and uncertain language in which exh. P1 has been cast, I very respectfully concur with the learned judge's finding that there was no concluded and enforceable agreement between the parties who executed exh. P1. But even if the learned judge and I are wrong in the view we have taken of the matter, there is, in my respectful view, another ground on which the decision of the learned judge may be upheld.

To recall, the agreement, if any, was for the second to the sixth defendants to transfer Dragonbite shares belonging to Boltex to the plaintiff. Now, I must say that I found that most odd when it was put to us by learned counsel for the appellants during argument. If the shares belonged to Boltex, it is hardly comprehensible how persons who have no ownership rights in those shares can possibly enter into an agreement dealing with their transfer. And since Boltex was not a party to exh. P1, any promise that may have been made by the second to the sixth defendants is not enforceable against it by reason of the doctrine of privity of contract. See, *Kepong Prospecting Ltd & Ors v. Schmidt* [1968] 1 MLJ 170.

The source of the confusion in the minds of the plaintiffs when pursuing their claim against the second to the sixth defendants is their oversight of the fundamental principle that a company is a separate entity distinct from its shareholders. The property owned by a company belongs to it and not to its shareholders. That proposition was established by the leading case of *Macaura v. Northern Assurance Co Ltd & Ors* [1925] AC 619 where Lord Buckmaster said:

> Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the Company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

It follows that the plaintiffs and the second to the sixth defendants had no right whatsoever to contract over the property of a third party, namely, Boltex. But, says counsel for the plaintiffs, the matter may be easily resolved by lifting the veil of incorporation of Boltex. I regret that I find myself unable to accede to this submission. It is true that at one point of time the view held by some academics and judges (including Lord Denning) was that the corporate veil could be cast aside whenever the interests of justice required it. In our jurisdiction, the high level watermark favouring this view is *Hotel Jayapuri Bhd v. National Union of Hotel Bar and Restaurant Workers* [1980] 1 MLJ 109, where Salleh Abas FJ (sitting at first instance as a High Court judge) said:

It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* as was decided in *Smith, Stone and Knight v. Birmingham Corporation* [1938] 4 All ER 116; *Re FG (Films) Limited* [1955] 1 WLR 483; and Firestone Tyre & Rubber Co v Llewelyn [1957] 1 WLR 464. Professor Gower in his *Principles of Modern Company Law*, 3rd edn, page 213, said that the courts

> are coming to recognise the essential unity of a group enterprise rather than the separate legal entity of each company within the group. Other examples of this can be found. In *The Roberta* [1937] 58 Ll LR 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the court saying that the subsidiary was 'a separate entity…in name alone and probably for the purposes of taxation'. In another case, *Spittle v. Thames Grit & Aggregates Ltd* [1937] 4 All ER 101, the court found no difficulty in treating a subsidiary as 'to all intents and purposes' the same as the parent company which held 90 per cent of its shares. A licensing authority in exercise of its discretion has been held entitled to have regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd v. British Transport Commission* [1962] 2 QB 173, Devlin LJ at page 202) … A good example of this is *Bird & Co v. Thos Cook & Son* [1937] 2 All ER 227, in which an indorsement of a cheque to 'Thos. Cook & Son Ltd.' was treated as an indorsement to the allied but separate company of Thos. Cook & Son (Bankers) Ltd. by regarding it as a mere misdescription to be ignored under the principle *falsa demonstratio non nocet.*

However, a careful look at the contemporary cases shows that the view expressed by Salleh Abas FJ in the High Court and by Professor Gower no longer prevails. Indeed, the 7th edition of Gower's work no longer canvasses the earlier opinion quoted by Salleh Abas FJ. But that is not to say that the court in the *Hotel Jayapuri* case was wrong in lifting the veil of incorporation on the facts of that case. The *Hotel Jayapuri* case was concerned with the Industrial Relations Act 1967 which requires the Industrial Court to disregard technicalities and to have regard to equity, good conscience and the substantial merits of a case. Accordingly, in industrial law, where the interests of justice so demand, it may, in particular cases be appropriate for the Industrial Court to pierce or to disregard the doctrine of corporate personality. That is what happened in the *Hotel Jayapuri* case and no criticism of that case on its facts may be justified.

A moment ago I mentioned *Gower*'s 7th edn. The relevant passage is at p. 184 and reads as follows:

> Challenges to the doctrines of separate legal personality and limited liability at common law tend to raise more fundamental challenges to these doctrines, because they are formulated on the basis of general reasons for not applying them, such as fraud, the company being a 'sham' or 'facade', that the company is the agent of the shareholder, that the companies are part of a 'single economic unit' or even that the 'interests of justice' require this result. However, the courts seem, if anything, more reluctant to accept such general arguments against the doctrines than arguments based on particular statutes or the terms of particular contracts.

The editor of the 7th edition cites *Adams v. Cape Industries Plc* [1990] Ch 433 as the leading case on the subject and says this (referring to the judgment of the Court of Appeal in that case):

> Moreover the court declared that it did not accept that:
>
> > as a matter of law the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group, merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.

And in a later passage the learned editor goes on to say this under the heading "Interests of justice":

> Although the interests of justice may provide the policy impetus for creating exceptions to the doctrines of separate legal personality and limited liability, as an exception in itself it suffers from the defect of being inherently vague and providing to neither courts nor those engaged in business any clear guidance as to when the normal company law rules should be displaced. Consequently, it is difficult to find cases in which 'the interests of justice' have represented more than simply a way of referring to the grounds identified above in which the veil of incorporation has been pierced.

I may add that the liberal view expressed by Lord Denning MR in such cases as *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council* [1976] 1 WLR 852 can no longer be sustained. In that case, the Master of the Rolls said:

> Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdworth & Co (Wakefield) Ltd v. Caddies* [1955] 1 All ER 725]. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

In *Woolfson v. Strathclyde Regional Council* [1978] SLT 159 Lord Keith in whose speech the other members of the House of Lords concurred said of the decision of the English Court of Appeal in the DHN case:

> I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that is a mere facade concealing the true facts. (emphasis added).

In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity. The former, that is to say, actual fraud, was expressly recognised to be an exception to the doctrine of corporate personality by Lord Halsbury in his speech in *Salomon v. A Salomon & Co Ltd* [1897] AC 22, the seminal case on the subject. For, this was what the Lord Chancellor said:

> I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence? quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

A good illustration of equitable fraud as a ground for piercing or disregarding the corporate veil is *Jones v. Lipman* [1962] 1 All ER 442. In that case, the first defendant after agreeing to sell his property to the plaintiffs for £5,250 sold and transferred it to a company of which he and his solicitors' clerk were shareholders and directors for £3,000. The plaintiffs sued for and obtained a decree of specific performance against the company of which Russell J (later Lord Russel of Killowen) said:

> The defendant company is the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity … an equitable remedy is rightly to be granted directly against the creature in such circumstances.

In *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd* [1997] 1 CLJ 529, Chong Siew Fai (CJ, Sabah & Sarawak) said that in:

> cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.

His lordship was there, of course, referring to the legal basis upon which judicial intervention has occurred in cases such as *Jones v. Lipman.*

In the present appeal, it is not the plaintiffs' case that special circumstances exist here indicating that Boltex is a mere facade concealing the true facts. Nor was a case of actual or equitable fraud raised on the pleading. It is therefore of no avail to the plaintiffs to say without more that this is a case for piercing the corporate veil. They simply did not lay any evidential foundation to support that plea. On the basis of current authority there is therefore no justification whatsoever in law to pierce the corporate veil of Boltex for the purpose of treating its property as the property of the second to the sixth defendants.

So far as the counterclaim is concerned, the learned trial judge dismissed it on the ground that there was no basis for it. We respectfully express our concurrence with the judge's reasons for the dismissal. In any event, if the plaintiffs did any harm to Dragonbite or its property, it does not lie in the mouth of Boltex to complain about it unless it can bring itself within one of the exceptions to the rule in *Foss v. Harbottle* [1843] 67 ER 190. But the counterclaim was never argued on that basis. So that is an end of that.

For the reasons already given, the appeal and cross appeal are without any merit and are each dismissed with costs. The deposit in court is to be paid out to the first respondent to account of its taxed costs. All the orders made by the learned judge are affirmed. My learned brother Vincent Ng J has seen this judgment in draft and has expressed his agreement with it.

I must add by way of postscript that this appeal was heard by a Bench of this court which included my learned sister Rahmah Hussein, JCA who has since retired. This judgment is accordingly delivered pursuant to s. 42 of the Courts of Judicature Act 1964, as amended.